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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 483

UNITED STATES GYPSUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 169-176) is reported at 206 F. 2d 410. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 87-107) are reported at 94 NLRB 112. The Board's subsequent order (R. 151-154), amending its original decision and order, is reported at 97 NLRB 889.

JURISDICTION

The decree of the court below (R. 184-187) was entered on October 27, 1953. The petition for a

writ of certiorari was filed on November 27, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are set forth in Appendix A to the Petition, pp. 25-31.

QUESTIONS PRESENTED

1. Whether a complaint issued by the Board's General Counsel may, under Section 10(b) of the Act, allege an unlawful refusal to rehire an employee where the violation occurs after the filing of the charge, which alleges a continuing failure to reinstate the employee, and more than six months prior to the filing of an amended charge which repeats that allegation.

2. Whether the Board may properly issue a decision and order in an unfair labor practice case involving violations of Section 8(a)(1) and (3) of the Act, where the charging union was in full compliance with the filing requirements of Section 9(f), (g) and (h) of the Act when the complaint and the order issued, but its local at the employer's plant, which did not come into existence until after the complaint issued, was not in compliance at the time the order issued.

3. Whether the Board's order requiring petitioner to make an employee whole for any loss of pay suffered by him as a result of petitioner's discrimination against him during the period "from

the date of discrimination to the date of offer of reinstatement" is not entitled to enforcement because the Board did not find, and the order failed to specify, the exact date on which the discrimination began.

STATEMENT

A. *Procedural background*—The original charge in this case was filed by the Union (International Woodworkers of America, C. I. O.) on February 21, 1949, alleging, *inter alia,* that petitioner had "interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the . . . Act" (R. 13). An amended charge was filed by the Union on April 25, 1949, which added to the above an averment that petitioner on or about February 6, 1949, had discriminatorily discharged an employee, Hiram Peoples, "and at all times since [his discharge, had] refused to employ [him]" because of his union activities (R. 18). Thereafter, on April 17, 1950, a second amended charge was filed which, in addition to making changes immaterial here, substantially reiterated the above allegations (R. 22). On April 17, 1950, the Board's General Counsel issued the complaint herein, alleging, *inter alia,* that petitioner had commited unfair labor practices by failing to reinstate employee Peoples, following a layoff, because of his union activities, and by interrogating and threatening its employees with respect to their union activities (R. 24, 26, 29). Petitioner answered the complaint by denying the commission of any unfair labor practice, and

a hearing was held on the issues thus raised (R. 32-39).

B. *The Board's decision and order*—Upon the evidence adduced at the hearing the Board (R. 88, 94-96) entered findings, not disputed here, that petitioner had violated Section 8(a)(1) and (3) of the Act by interrogating employees as to their attitude towards the Union and discriminatorily refusing to rehire Peoples. With respect to Peoples, the Board concluded that although petitioner had laid him off in February 1949 for economic reasons, and hence had not discriminated against him on that date, as averred in the first amended charge, it had failed to recall him in the spring of that year, when work became available, because of his Union activities and had thereby violated Section 8(a)(3) of the Act.[1]

In concluding that petitioner had unlawfully discriminated against Peoples, the Board rejected petitioner's contention that the finding of discrimination with respect to him was precluded under Section 10(b) of the Act because the second amended charge, which covered the period in which the discrimination found occurred, was filed more than six months subsequent to that unfair labor

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[1]The Board also found that petitioner had discriminated against two other employees because of their Union activity and that it had unlawfully refused to bargain with the Union (R. 88-94, 96-102). Subsequently, in its amended order (R. 151-154), the Board dismissed the complaint insofar as it alleged that petitioner had unlawfully refused to bargain. The findings with respect to the other two employees were rejected as unsupported by the court below (R. 171) and no issue is presented here with respect to them.

practice. According to the Board, the allegation in the complaint and the finding with respect to petitioner's discriminatory refusal to recall Peoples were adequately supported by the original and the first amended charges, both of which were filed before the unfair labor practice was committed and which therefore were not defeated by the six-month limitation of Section 10(b) (R. 151-152).

To remedy the foregoing unfair labor practice, the Board issued its order requiring petitioner to cease and desist from its unlawful conduct; to reinstate Peoples and to make him whole for any loss of pay caused by the discrimination against him for the period from the date of discrimination to petitioner's offer of reinstatement; and to post appropriate notices (R. 102-105).

C. *The decision of the court below*—Upon proceedings to enforce the Board's order, the court below held (R. 169, 171, 174-175) that the Board's unfair labor practice findings described above were supported by substantial evidence and enforced the Board's order with respect to them. Like the Board, the court below rejected (R. 170-171) petitioner's contention that the allegations of the complaint were not properly supported by a timely filed charge.

In addition, the court below rejected (R. 175-176) petitioner's further contention that the complaint should have been dismissed because the Union had organized a local at petitioner's plant which had not complied with the filing requirements of Section 9(f) and (h) of the Act. This

contention was made in a motion to the court below for leave to adduce additional evidence (R. 155-159), by which petitioner sought to establish that the local had been chartered prior to issuance of the Board's Decision and Order, and that it had not filed the data required in Section 9(f) and (h). The court below (R. 175-176), noting that the Union was the charging party, that it had been in full compliance at the time the complaint was issued, and that the local was not in existence when the complaint was issued, denied the motion on grounds of immateriality. Relying on this Court's decision in *National Labor Relations Board* v. *Dant,* 344 U. S. 375, the court below held (R. 176) that "the date the complaint issued was the crucial time [for compliance] under Section 9(h)," and that therefore the requirements of that Section had been satisfied in this case.

ARGUMENT

1. As the Petition states (pp. 12, 16), the ruling of the court below that the Board has power to make findings with respect to unfair labor practices committed after the filing of the charge initiating the proceedings and more than six months prior to the filing of an amended charge, is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Corp.* v. *National Labor Relations Board,* 202 F. 2d 613, 619. On the other hand, the ruling of the court below is supported by a decision of the Court of Appeals

for the Third Circuit [2] and an earlier decision of the Fifth Circuit.[3] Nevertheless, for the reasons stated below, the Board believes that certiorari should not be granted with respect to this question at the present time.

This question appears basically the same as one of the issues pending before the Court in *Gaynor News Company* v. *National Labor Relations Board*, No. 7, this Term. In the *Gaynor* case, the General Counsel of the Board, upon a charge filed by a single employee asserting that an unfair labor practice had been committed against him, issued a complaint alleging that the employer by the same action had discriminated against other employees similarly situated. Petitioner there, like petitioner here, argues that the language of Section 10(b) of the Act permits a complaint to allege as unfair labor practices only that conduct specifically identified by the charge. From this, petitioner in the *Gaynor* case urges that the Board could not properly include in the complaint any names, not also listed in the charge, of employees victimized by the employer's unlawful acts. In like vein, petitioner here urges that none of the charges filed in this case adequately supports the allegation in the complaint, or the Board's finding, that petitioner discriminatorily refused to rehire Peoples.

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[2] *National Labor Relations Board* v. *Top Mode Manufacturing Co.*, 203 F. 2d 482, pending on petition for certiorari, No. 210, this Term. See the Board's Brief in Opposition, p. 10.

[3] *National Labor Relations Board* v. *Harris*, 200 F. 2d 656, 658.

Thus, the original and first amended charges are asserted to be inadequate because they were filed prior to the time of the discrimination found and therefore could not specifically cover the critical period, and the second amended charge because it was not filed within the six-month period prescribed by Section 10(b) (Pet. 12-17).[4]

As the foregoing indicates, the exact questions in the *Gaynor* case and here are not based upon identical factual situations—*Gaynor* testing the Board's view that a charge of unlawful conduct against a single employee will support a complaint against other employees similarly situated, and this case presenting the Board's view that a charge of unlawful conduct will support a complaint against such conduct although it occurs subsequent to the charge. Nonetheless, they both invoke the same basic construction of Section 10(b). For it is the Board's view, as discussed fully in its brief in the *Gaynor* case (pp. 44-55), that the limitation proviso to Section 10(b), adopted in 1947, was not intended to alter the established rule under the Wagner Act that the complaint was not limited to the violations alleged in the charge, but could embrace other violations uncovered by the Board in the course of

[4] The petition suggests (p. 3, n.) that only the second amended charge is relevant in this case because the notice of hearing, issued by the Board's regional director, stated that "the complaint is based" upon it (R. 31). However, this statement refers only to the fact, as both the second amended charge and complaint make clear, that certain of the allegations of the earlier charges had been omitted. Petitioner's insistence on drawing a different inference, unsuccessful before both the Board and the court below, raises no question warranting review by this Court.

investigating the charge. The proviso, in the Board's view, only precludes allegations in the complaint of any unfair labor practices occurring more than six months prior to the filing and service of the charge initiating the case. Accordingly, if this construction is approved by the Court in *Gaynor,* it will control the question petitioner has raised in this case. Similarly, a rejection of the Board's position in *Gaynor* might dispose of the present question. In these circumstances, we submit that the Court should retain the instant petition on its docket until it has decided the *Gaynor* case.

2. Petitioner's contention (Pet. 18-22) that the Board's order is invalid because it was issued at a time when the Union's local at petitioner's plant was not in compliance with the requirements of Section 9 (f) and (h) of the Act is insubstantial and does not warrant review by this Court. As petitioner concedes (Pet. 20), the local was not in existence at the time the complaint was filed, and the Union, the charging party, was then in full compliance with the Act's filing requirements. Under the decision of this Court in *National Labor Relations Board* v. *Dant,* 344 U. S. 375, no more was necessary to authorize the Board to process the case and issue its decision and order.

Section 9(h) of the Act states, in relevant part, that "no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board [a non-Communist] affidavit. . . ." Section 9(f) imposes the same limitation with re-

spect to the filing by the charging Union of specified operational and financial data. In the *Dant* case, this Court, resting its conclusion on the "particularity" with which the foregoing language specified the critical time for compliance, ruled that "the 'unless' clause limits the issuance of a 'complaint.' " 344 U. S. at 379, 380.

Accordingly, just as the carefully limited words of Section 9(f) and (h) could not be stretched to require compliance at the time of the filing of the charge in the *Dant* case, neither can they be stretched to require compliance at the time of the issuance of the Board's Decision and Order in this case.

Moreover, assuming *arguendo* that the statute requires compliance by the charging union both when the complaint and the Board's order issue, this condition is also met here. The Union, the charging party, was in compliance on both dates. The circumstance that the Union's local may not have been in compliance when the order issued is not controlling. The Act on its face does not require compliance by labor organizations *subordinate* to the charging party in order to make the statutory remedies available to the charging union, except where it has been proved that the charging party filed a charge on behalf of its subordinate as a subterfuge to circumvent the Act's filing requirements. *Northern Crate & Lumber Co.*, 105 NLRB No. 22. Obviously, no such claim can be advanced here for the Union's local did not come into exist-

ence until after charges were filed and the complaint issued.[5]

3. Petitioner's claim of invalidity of the back pay provision of the Board's order on the ground that the Board has not determined the precise dates with respect to which People's wage losses should be computed (Pet. 17-18) is not properly before the Court. Although the trial examiner's intermediate report recommended that provision be made in the order for reimbursing Peoples, petitioner did not raise before the Board the objection that it now presses to that recommendation.[6] Accordingly, petitioner cannot now assert that the court below erred in this respect, for Section 10(e) of the Act provides that "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of

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[5] Where, unlike here, the Board's order requires an employer to bargain with a labor organization, the Board normally conditions its operation upon the compliance status of any local to whose favor the order redounds. *Sunbeam Corporation*, 98 NLRB 525; *Prudential Insurance Co.*, 81 NLRB 295; *Lane-Wells Co.*, 77 NLRB 1051. This is done under the remedial authority of the Board, and is considered appropriate only in bargaining cases, where, unlike the reinstatement and cease and desist order in this case, the benefit of the order inures directly to the organization which represents the employees.

[6] Petitioner's blanket exception to all of the Intermediate Report's recommendations concerning the remedy (R. 82) of course does not suffice to preserve its present position. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255. The first mention of this contention was made in the court below in the petition for rehearing (R. 180-181), which was denied without opinion (R. 184).

extraordinary circumstances." Petitioner makes no mention of any "extraordinary circumstances" which might excuse its failure in this case. See *National Labor Relations Board* v. *Seven-Up Bottling Company,* 344 U. S. 344, 350; *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U. S. 385, 387-389; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255.

In any event, the contention is wholly without substance. The determination of the precise period of time for which reimbursement must be made to victims of an employer's discrimination is, contrary to petitioner's contention, properly relegated by the Board to the phase of an unfair labor practice case which follows the issuance of an enforcement decree.

Indeed, in approving the practice which petitioner now asserts to be invalid, this Court has expressly pointed out that the fixing of the specific dates for which an employer's back pay liability is incurred is a factor to be considered after an enforcement decree has been entered. *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 29-30. See also *National Labor Relations Board* v. *Bird Machine Co.,* 174 F. 2d 404 (C.A. 1); *National Labor Relations Board* v. *Wentworth Bus Lines, Inc.,* 191 F. 2d 849, 850 (C. A. 1); *Wallace Corp.* v. *National Labor Relations Board,* 159 F. 2d 952 (C. A. 4); *National Labor Relations Board* v. *Royal Palm Ice Co.,* 201 F. 2d 667, 668 (C. A. 5). *National Labor Relations Board* v. *New York*

Merchandise Co., 134 F. 2d 949, 952 (C.A. 2), relied upon by petitioner, scarcely supports its position, for the Court there decided that an enforcement decree might properly precede further proceedings before the Board to ascertain the amount of back pay owed by the employer. 134 F. 2d at 951-952.

CONCLUSION

For the foregoing reasons, we respectfully suggest that, insofar as the first question herein is concerned, this Court retain the present petition on its docket pending decision in *Gaynor News Company* v. *National Labor Relations Board*, No. 7, this Term. The second and third questions herein present no issues warranting review, and the petition should in any event be denied as to them.

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DECEMBER, 1953.

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FILED
JAN 30 1954
HAROLD B. WILLEY, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

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UNITED STATES GYPSUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONER.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONER.

The National Labor Relations Board endeavored to restate in its Memorandum the questions presented in the Petition. It restated, however, only three of the four questions in the Petition, making no mention of Question 1. Question 1 in the Memorandum for the Board apparently was intended to present the issues under both Questions 1 and 2 in the Petition, but Question 1 in the Memorandum is based on a factual situation found only in Question 2 in the Petition, *i. e.*, that the circumstances under which the Board found Petitioner should have re-employed Hiram Peoples did not arise until some time subsequent to the filing and service of the amended charge but more than six months prior to the filing and service of the second amended charge upon which the complaint issued.

The Board confirms the conflict on this question (Question 2 in the Petition) between the decision of the court below and the decision of the Court of Appeals for the Seventh Circuit in *Indiana Metal Products Co.* v. *National Labor Relations Board,* 202 Fed. 2nd 613, 619. It suggests that certiorari should not be granted with respect to this question at this time but that the Petition be held on the docket pending the decision in *Gaynor News Company, Inc.* v. *National Labor Relations Board,* No. 7 this Term, for the stated reason that the construction given by this Court to Section 10 (b) of the Act in the *Gaynor* case may decide the present petition. It would appear, therefore, that the Board desires that the conflict on this question be resolved by this Court, if it is not decided in the *Gaynor* case.

Petitioner is of the opinion, however, that the issues presented under Question 2 in the Petition are not basically the same as those in *Gaynor News Company, Inc.* v. *National Labor Relations Board,* No. 7 this Term. In that case, certain benefits given to union employees under a contract with a union were not given to a non-union employee who filed a charge stating that fact. More than six months later an amended charge was filed and served which questioned for the first time the validity of the contract with the union and charged that the Gaynor News Company, Inc., had similarily discriminated against other employees not named. Unlike the instant case, however, the charge filed within the statutory period stated facts that had actually occurred and upon which the complaint was based, with the exception of the names of other employees similarly situated. The petitioner in the *Gaynor* case argued that the Act did not empower the Board to solicit litigation on behalf of individuals, nor to commence litigation on behalf of unnamed persons, and that a class suit is a particularized form of action which the Board does not

have the power to institute without express authority under the statute. It also argued that the violation had to be proven as to each unnamed employee and that in the case of each individual the petitioner had the right to cross-examination. (See Brief for Petitioner, Point IV, pages 39-42, No. 371, October Term 1952). These are not issues involved in the present petition.

The Board states (page 7) that the ruling of the court below is supported by a decision of the Court of Appeals for the Third Circuit in *National Labor Relations Board* v. *Top Mode Manufacturing Company*, 203 Fed. 2nd 482, 485, pending on petition for *certiorari*, No. 210 this Term. In that case the Court of Appeals for the Third Circuit held that the subsequent violations related to unfair labor practices alleged in a charge filed and served within the statutory period (see footnote, page 16 of the Petition herein). In the instant case, however, the violation stated in the amended charge filed within the statutory period alleged a discriminatory discharge of Hiram Peoples which was not well founded. Peoples was not discharged but lawfully laid off.[1] At the time of filing and service of the amended charge no discrimination against Peoples or any other employee had occurred to which the subsequent failure to employ Peoples charged in the second amended charge and found by the Board could relate.

The Board refers (Page 8) to its brief in the *Gaynor* case. It is not feasible for Petitioner in this reply to answer all contentions on the construction of Section 10 (b) advanced by the Board in the full argument of that case. Petitioner calls attention, however, to the fact that a number of the decisions under the present Act cited by the Board on this point sustained the Board's authority to issue a complaint on the unfair labor practices then in

1. The court below found that Petitioner "was fully justified in laying off Peoples" (R. 174).

question on the ground that they related to unfair labor practices in a charge filed and served within the statutory period. The basis of these decisions is not consistent with the Board's position that after any charge has been filed and served, it may issue a complaint based on unfair labor practices without limitation whatsoever as to the nature thereof, provided the violations occurred within six months of the filing and service of the initial charge.

Question 1 in the Memorandum for the Board refers to a continuing violation. This particular phrasing of the question is misleading. Having been lawfully laid off for an indefinite period Peoples had no legal right to demand employment until such time as his services might be needed. Conversely, there was no obligation on the Petitioner to employ Peoples unless and until his services were needed. The Board found that the need for his services arose some time later. At the time of the filing and service of the amended charge there had been no violation or discrimination against Peoples and until such violation occurred there could be no continuing violation with reference to his employment.

The Board makes no comment concerning the conflict between the decision of the court below on Question 1 in the Petition and the decision of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills Co.* v. *National Labor Relations Board,* 176 Fed. 2nd 749, 754, and the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Globe Wireless, Ltd.,* 193 Fed. 2nd 748, 752. Question 1 in the Petition involves a factual situation substantially different from that in the *Gaynor* case. In the instant case the original and amended charges filed within the statutory period stated that Petitioner had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and had interfered with,

restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act but alleged no facts or particular violation found by the Board which might be enlarged or expanded into a charge of interrogation of employees. Petitioner had no notice that it would be required to respond to the charge of interrogation until a year later when the complaint issued charging Petitioner with such violations. The decision in the *Gaynor* case will not decide Question 1 in the instant petition unless this Court determines a question not directly involved in that case, *i. e.*, whether the provisions of the statute are met (the so-called statute of limitations stayed) if any kind of a charge has been filed within the statutory period. To hold in the affirmative will have the effect, as stated by Judge Pickett in his dissenting opinion in *Kansas Milling Co.* v. *National Labor Relations Board,* 185 Fed. 2nd 413, 422 (C. A. 10), of nullifying the statute.

The Board explains that the paragraph in the notice of hearing issued by the Board, which states, "A copy of the Second Amended Charge upon which the Complaint is based, is attached hereto" (R. 31), "refers only to the fact, as both the second amended charge and complaint make clear, that certain of the allegations of the earlier charges had been omitted." (Memorandum for the Board, Footnote 4 Page 8.) If that was the purpose of this paragraph it could be ascertained only by a process of deduction. There was no mention whatsoever of the original charge or amended charge in either the complaint or notice of the hearing thereon. The complaint did, however, omit the specific unfair labor practices alleged in the earlier charges and allege unfair labor practices based on the second amended charge.

The Board states that Petitioner's claim of invalidity of the back pay provision of the Board's order is not properly before the Court for the reason that Petitioner did not

raise the question before the Board. (Memorandum for Board p. 11.) Petitioner makes no claim that the Board's order for back pay was invalid. Petitioner contends that the Court of Appeals should not have granted enforcement of this part of the Board's order until the Board had determined at least the essential facts prerequisite to the determination of the amount which Petitioner is required to pay to Peoples in order to comply with the enforcement order. This question did not arise until the Board made application for enforcement. There was no occasion to raise it before the Board.

The determination of the date upon which Petitioner should have employed Peoples is not a simple matter. The evidence in the record before the Board was insufficient for that purpose. The Trial Examiner defined the date of the discrimination as "that somewhat uncertain date * * * in the spring or summer of 1949, where, absent discrimination, * * * (he) would have been recalled." (Footnote 16, R. 136.) The only evidence of this date in the record before the Board is a list of the employees released and hired in the fabricating department at Petitioner's plant during the period from January 1, 1949 through September 1, 1949 (General Counsel's Exhibit 14, Appendix to the Board's Brief, pp. 193, 203-8) from which the Board found that by July 31, 1949 Petitioner had employed more employees in this department than were employed at the time of Peoples' layoff (R. 95). The evidence on the hearing before the Trial Examiner was directed principally to the reason why Peoples had been included among the employees laid off and the record contains practically no evidence with reference to the work for which new employees were subsequently hired.

The definite date of the discrimination found by the Board is an essential fact which must be determined by the

Board. When the Board adopted the Trial Examiner's finding that this was an "uncertain date," it in effect retained jurisdiction to determine the date of the discrimination prior to proceedings to fix the amount required to make Peoples whole. *National Labor Relations Board* v. *Prigg,* 172 Fed. 2nd 948, 949 (C. A. 5, February 25, 1949). Pending determination of the date of discrimination and the amount to be paid, there should have been no enforcement of that part of the Board's order. This Court has held that such a matter should be "left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 200.

Paragraph 2 (b) of the decree entered by the court below directed Petitioner to make whole Hiram Peoples in the manner provided in the Intermediate Report of the Trial Examiner (R. 184, 185). On its face this is a peremptory order. If, nevertheless, as the Board apparently contends, Petitioner is not obligated to comply with this paragraph of the decree unless and until the Board has found the date of discrimination against Peoples and the specific sum to be paid to him and this sum has been incorporated in the decree by supplemental order, this provision not only conflicts with the decision of this Court in *Phelps Dodge Corp.* v. *Labor Board, supra,* but serves no purpose. The method by which Petitioner might secure review of the subsequent proceeding by the Board is uncertain. Neither the statute nor the Rules and Regulations of the Board provide for such further proceedings. Petitioner respectfully submits that Question 3 in the Petition has substance and merits consideration by this Court.

The decision of this Court in *Nathanson* v. *Labor Board,* 344 U. S. 25, 29-30, cited by the Board, is fully consistent

with Petitioner's position on this question. That decision, insofar as it has any application to the instant case, held that prior to the final disposition of an unliquidated claim against a bankrupt employer for back pay awarded by the National Labor Relations Board the District Court should refer the claim to the Board for liquidation, giving the Board a reasonable time for its administrative determination.

Respectfully submitted,

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January 28, 1954.